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Supreme Court, U.S.
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No. 02-1694

IN THE

Supreme Court of the United States

BETTY WILLINGHAM,

Petitioner,

v.

JAMES LOUGHNAN and BRIAN BEUCLER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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Petitioner, Betty Willingham, respectfully replies to Respondents' Brief in Opposition.

STATEMENT OF THE CASE

In their response, Respondents allege that Petitioner was simultaneously shot by them within a split second of having attempted to murder officer Panucci. (Respondents' Brief, p. 1). In fact, no evidence was presented by Respondents that they had simultaneously fired at the Petitioner, nor did they state that their actions occurred within a "split second of having attempted to murder officer Panucci." *Id.*

Respondents also state that:

> [a]ccording to the officers, who testified at her criminal and civil trial, she had a long blade kitchen knife in her hand and was attempting to stab Pannuci in the back at the time she was shot. *An independent witness testified at both trials that she was on the step outside her house with an object in her hand at the time she was shot.*

(Emphasis added). (*Id.*). Again, these misrepresentations are in direct contradiction to the eyewitness testimony and the physical evidence presented at the civil trial. In fact, the testimony of Mr. Williams, the "independent witness" can best be summed up by his statement that the reason he went to the police department, despite being warned not to, "I just went down there because *I thought it was my duty, because I thought they shot Betty for nothing.*" At the time that she was shot eight times by Respondents Beucler and Loughnan, Betty Willingham was standing in the threshold of her kitchen doorway with both her hands grasping her

hair and screaming for them to "stop the dog." The dog in question was Panucci's police dog that was attacking the Petitioner's brother.

According to Respondents,

> [t]he Court of Appeals, in an unpublished opinion, affirmed the denial of the motion for summary judgment due to the claimed factual dispute of whether Plaintiff was doing nothing at the time she was shot or was attempting to murder an officer. In the panel's view, the issue preclusion argument . . . was not properly presented for review.

(*Id.*, p. 2). This is also incorrect. On August 27, 1997, during oral argument, Respondents' counsel, in response to the Court of Appeals panel's questioning the Respondents' failure to provide the criminal trial transcript to the district court or the appellate court, responded that said transcript would not assist the court in determining the basis of the criminal jury's conviction of the Petitioner. (*See* Judges' tape of oral argument in Case No. 96-4714). The Eleventh Circuit affirmed the ruling of the district court, holding that

> . . . [a]lthough appellants seek to rely upon the plaintiff's prior conviction of attempted second degree murder, we decline to address any issue of collateral estoppel or issue preclusion because the appellants did not present the criminal trial transcript to the district court in support of their motion for summary judgment, nor did they include said transcript in the record on appeal. In the absence of any issue preclusion, and in the

> summary judgment posture of this case, we must accept as true plaintiff's version of the relevant facts . . . *If the officers fired on plaintiff even though she was posing no threat to anyone, they would have violated clearly-established law.*

(Emphasis added). *See* Appendix F, at 78a.

Respondents also argue that "[h]er version of the events was rejected when she was convicted in June 1989 of both crimes by the Palm Beach County criminal court jury, a conviction that was neither appealed nor vacated." (Respondents' Brief, p. 1). This is incorrect. While initially charged with attempted first degree murder, the Petitioner, at the criminal trial, was convicted of attempted second degree murder, which required no specific intent and was consistent with her testimony that she had thrown one knife in the direction of Panucci's dog. Nothing in the transcript of the criminal trial determines whether the Petitioner was convicted of attempted second degree murder of Pannucci based upon lunging or throwing a second knife, as alleged by the Respondents. In fact, at no time prior to or during the trial did Respondents cite to the district court any portion of the criminal transcript where it was determined from the record that the Petitioner had been convicted for throwing a second knife. At both the criminal and civil proceedings, the Petitioner admitted to throwing two bottles and one knife. Under Florida law, attempted first degree murder requires that a defendant had the specific intent to murder a particular person. By finding her guilty of attempted second degree murder, the criminal jury clearly based its verdict upon the admissions of the Petitioner that she had thrown two bottles and one knife. Based upon the evidence presented, the

Petitioner had completed the act for which she was convicted, and, at the time of the excessive force by Respondents, she was unarmed and not a threat to anyone.

Significantly, the district court, in denying Respondents' motion for judgment as a matter of law, stated:

> Having now had the opportunity to review the transcript of the criminal trial (to the extent available) in light of *Vasquez* and Florida law concerning collateral estoppel generally, the undersigned remains unable to conclude that Willingham's conviction necessarily resolved the question of whether the officers used unconstitutionally excessive force. Among other important distinctions, Willingham maintained in the criminal trial, just as she had in her civil trial, that she threw only one knife, and was unarmed at the time of the shooting. ***Thus, although the jury found her guilty of attempted second degree murder of Panucci, the jury may have resolved the conflict in the evidence concerning whether one or two knives were thrown to be consistent with Willingham's version of the offense.*** If that occurred, the jury would never have reached the issue of whether Willingham was acting in self defense and whether the officers were justified in the use of deadly force after the first knife was thrown. Thus, similar to *Vasquez, it cannot be ascertained whether Willingham's criminal trial jury ever addressed the propriety of Loughnan and Beucler's actions.*

(Emphasis added). *See* Appendix D, at 44-5a.

The district court went on to state:

> Given the conflicts in the evidence concerning the sequence of the pertinent events and the general nature of the verdict, Defendants cannot demonstrate that a determination that the officers were justified in shooting Willingham was a critical and necessary part of the jury's decision that Willingham attempted to kill Panucci. *Therefore, collateral estoppel and issue preclusion, did not preclude Willingham from proceeding to trial in this case.*

(Emphasis added). *See Id.*, at 46a.

Not only was the case law clear at that time that the conduct of the Respondents was unlawful, the testimony of the Respondents clearly shows that they knew their conduct was unlawful. They knew in 1987 what every other law enforcement officer in the United States knew: It was unlawful to shoot an unarmed person who posed a threat to no one. It was for this reason that they concocted the lies about what Petitioner was doing at the time that they shot her and planted a second knife under her body.

I. The questions presented for review were timely raised or decided in the district or circuit court below:

The Petitioner was the Appellee in the proceedings below. Contrary to Respondents' argument, Petitioner, throughout the proceedings in the lower courts, cited to the facts and authorities from this Court, the Eleventh Circuit and other circuits that demonstrated that Respondents had "fair warning" that their conduct violated clearly established law.

II. The decision of the Eleventh Circuit is in conflict with this Court's Fair Warning Standard and the Approaches of the Other Circuits

The second panel rejected all analogous cases presented by Petitioner, stating that the "Plaintiff has pointed us to no case of the Supreme Court, Eleventh Circuit, or the Supreme Court of Florida" that "were close to this one in time or fact." *See* Appendix A, p.10a. The second panel also stated that it had conducted its own review of case law and concluded that the law was not clearly established in 1987. *Id*; *See* Appendix C, p. 29a. In its refusal to consider opinions of other circuits, the Eleventh Circuit failed to consider such cases as: *Webster v. City of Houston*, 689 F.2d 1220 (5th Cir. 1982) (a youth who had just committed a felony was confronted by police and shot within seconds, although unarmed at that moment with hands raised and officers, knowing their conduct was unlawful, planted a throw down weapon to justify their actions); *see also Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984); *Ellis v. Wynalda*, 999 F.2d 243 (7th Cir. 1993); *Abraham v. Raso*, 183 F.3d 279 (3d Cir. 1999); *Palmer v. Hall*, 517 F.2d 705 (5th Cir. 1975).

The Eleventh Circuit erred in ignoring evidence of the planted weapon, the lies and cover-up to justify Respondents' actions. Respondents would have this Court believe that this evidence is irrelevant in a qualified immunity analysis. (Respondents' Brief, p. 12). Petitioner never attacked her conviction. What said evidence demonstrated to the jury and the district court was that Respondents were fully aware at the time of the shooting that their conduct was objectively unreasonable and unlawful at the time. The evidence of the totality of the circumstances surrounding the arrest, including the planting of a weapon and lies, is relevant

to the determination of qualified immunity. *Brown v. City of Hialeah*, 30 F.3d 1433, 1436 (11th Cir. 1994).

The Eleventh Circuit did not focus on the totality of the circumstances, as did the civil jury and the district court; instead, it extracted one word from all the evidence and testimony presented in a three week trial to create an illusion that Respondents were required to make a "split-second" decision to shoot Petitioner. In fact, the sole support for the "split-second" timing scenario comes from one leading question by Respondents' counsel in his cross examination of Petitioner at trial. Contrary to the Eleventh Circuit's apparent weighing of evidence and credibility determinations, this "split-second" timing was simply Respondents' counsel putting words into Petitioner's mouth and not corroborated by either Respondent or any other witness during this trial.

All other circuits, except the Eleventh, expressly or implicitly follow this Court's lead in *Wilson v. Layne*, 526 U.S. 603 (1999), and look beyond their own jurisdiction in their "fair warning" analysis. Respondents, throughout their Brief, continue to misrepresent the positions of the other Circuits in their approach to determining clearly established law.

III. The Eleventh Circuit's rejection of the law-of-the-case doctrine is in conflict with its own precedents, other circuits and this Court

According to Respondents, the first Circuit panel opinion

> . . . was nothing more than a supposition that IF those facts which Plaintiff claims are in dispute are the ultimate facts and that the criminal trial transcript and

> conviction are not considered, then there would be no entitlement to qualified immunity. . . . Petitioner has not argued that the facts were the same at the motion for summary judgment stage as at trial.

(Respondents' Brief, p. 24).

At the summary judgment stage, Petitioner provided evidence that at the time of the shooting, she was unarmed and a threat to no one. At the trial, the Petitioner proved that she was unarmed and a threat to no one. In fact, the "ultimate facts" or actual facts were more chilling than what Petitioner had initially presented in her response to summary judgment.

Respondents, reading this Court's collective mind, presume that, in remanding this case back to the Eleventh Circuit for reconsideration in light of *Hope v. Pelzer*, 122 S. Ct. 2508 (2002), without addressing the specific issues raised in the first petition, this Court has found that the issue of the law-of-the-case doctrine, ignored by the Eleventh Circuit in both appeals, as being without merit. Petitioner argued this issue before the Court of Appeals on both occasions. The fact that the Eleventh Circuit refused to explain its rejection of its own precedents in the instant case is no indication that the issue was not considered by the lower court.

Respondents claim that, when denying the motion for summary judgment, neither the district court nor the Court of Appeals (first panel) addressed clearly established law and that the first panel "simply found that facts were in dispute". (Respondents' Brief, pp. 24-25). Only by revising the facts and omitting the relevant portion of the first panel's decision can they rely on *Oladeinde v. City of Birmingham*, 230 F.3d

1275 (11th Cir. 2000), for the proposition that the law of the case had not been established in this regard. None of the exceptions cited by *Oladeinde* are present in the instant case.

The second panel of the Court of Appeals simply refused to consider its own law-of-the-case doctrine, preempting both the jury and the district court's findings of fact, simply interjected its own different conclusions of fact by weighing the evidence and credibility of the witnesses. It is particularly notable that none of the independent eye witness testimony was even mentioned in either of the second panel's opinions, nor was the evidence of the planted weapon and cocaine.

> [T]he "law of the case" rule is based on the premise that "there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate of chances from changes in its members", and that it would be impossible for an appellate court "to perform its duties satisfactorily and efficiently" and expeditiously "if a question, once considered and decided by it were to be litigate anew in the same case upon any and every subsequent appeal" thereof.

Gaines v. Dougherty County Board of Education, 775 F.2d 1565, 1568 (11th Cir. 1985). *See also Heathcoat v. Potts*, 905 F.2d 367, 370 (11th Cir. 1990); *Piambino v. Bailey*, 757 F.2d 1112, 1120 (11th Cir. 1985), *cert. denied*, 476 U.S. 1169, 106 S. Ct. 2889, 90 L. Ed. 2d 976 (1986); *Burger King Corp. v. Pilgrim's Pride Corp.*, 15 F.3d 166, 169 (11th Cir. 1994).

The evidence presented at trial supports the findings by the jury that the Respondents violated the Petitioner's constitutional rights by using excessive force and that the constitutional right was "clearly established" at the time, thereby precluding the defense of qualified immunity. By "almost always" providing law enforcement with qualified immunity, the Eleventh Circuit has provided police officers with "carte blanche" in the manner in which they respond to criminal activity. *See* Appendix A, p. 7a. *See Vasquez v. Metropolitan Dade County*, 968 F.2d 1101, 1108-9 (11th Cir. 1992); *Graham v. Connor,* 109 S. Ct. 1865 (1989); *Brandenburg v. Cureton*, 882 F.2d 211 (6th Cir. 1989); *Hernandez v. City of Los Angeles,* 624 F.2d 935 (9th Cir. 1980).

CONCLUSION

For the foregoing reasons and as stated in her Petition, Petitioner respectfully requests that the Court grant certiorari.

Respectfully submitted,

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